



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

APR 10 2018

OFFICE OF WATER

Mr. David Ludder  
9150 McDougal Court  
Tallahassee, Florida 32312-4208

Re: Response to Petition for Determination That the Promulgation of New or Revised Water Quality Standards Are Necessary in the State of Alabama to Meet the Requirements of the Clean Water Act and to Prepare and Publish Proposed Regulations Setting Forth New or Revised Water Quality Standards for the State of Alabama

Dear Mr. Ludder:

We have reviewed and considered your Petition dated February 3, 2017, submitted to the Acting Administrator Catherine McCabe on behalf of eight organizations.<sup>1</sup> The Petition requests that the U.S. Environmental Protection Agency (EPA or Agency) make a determination under Clean Water Act (CWA) section 303(c)(4)(B) and conduct rulemaking to propose and promulgate new or revised water quality standards (WQS) for the protection of human health and aquatic life for the State of Alabama. The Petition states that revised WQS are necessary in order to adequately protect the designated uses of Alabama's waters or are otherwise necessary in order to meet the requirements of the CWA. The EPA is denying the Petition for the reasons explained below. This letter constitutes the EPA's response to your Petition.

The CWA and the EPA's implementing regulations at 40 C.F.R. Part 131 require states and authorized tribes to designate uses for waters within their jurisdictions and to adopt WQS including water quality criteria that protect those uses. As your Petition points out, the Alabama Department of Environmental Management (ADEM) must review and revise as appropriate its WQS rules and regulations every three years in accordance with section 303(c)(1) of the CWA and 40 C.F.R. § 131.20. This process is known as the triennial review. The ADEM held its most

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<sup>1</sup>Environmental Defense Alliance, Alabama Rivers Alliance, Inc., Black Warrior Riverkeeper, Inc., Cahaba Riverkeeper, Inc., Choctawhatchee Riverkeeper, Inc., Coosa Riverkeeper, Inc., Friends of the Little Cahaba River, Inc., and Friends of Hurricane Creek.

recent 2015-2017 triennial review public hearing in a timely manner, and historically has consistently held timely triennial review public hearings.

States and authorized tribes need a reasonable period of time to consider any new data and the latest science, as well as time to review and assess published EPA guidance including national recommended human health and aquatic life criteria for various pollutants. Most of the recommended criteria your Petition identifies were only published by the EPA in the last three years. The ADEM has stated that it will review and consider new science, such as the information reflected in the EPA's updated recommended ambient water quality criteria, during its 2018-2020 triennial review and explain its decisions regarding criteria adoption when reporting the results of its triennial review to the EPA under CWA section 303(c)(1) and 40 C.F.R. § 131.20(c).<sup>2</sup> The EPA anticipates that the ADEM will provide its technical basis for any criteria it adopts as well as an explanation for any decision to not adopt criteria for other pollutants. This includes methylmercury, which the ADEM has been working to address through its Total Maximum Daily Load (TMDL) program. It also includes acrolein, for which the ADEM has adopted human health criteria and has been in communication with the EPA about consideration of aquatic life criteria during its next triennial review.<sup>3</sup>

The EPA has used its discretionary authority under CWA section 303(c)(4)(B) to promulgate federal criteria and retains its discretion to use that authority as appropriate. Nonetheless, the EPA's long-standing policy, consistent with the CWA, has been that states have the primary responsibility for developing and adopting WQS for their jurisdictions while the EPA provides guidance and oversight. Here, where a state is in the process of reviewing and revising its WQS and the EPA anticipates the state will submit new or revised standards in the near future, the EPA prefers the "states-first" statutory process envisioned under CWA sections 101(b) and 303(c)(3) over the EPA exercising its backstop role under section 303(c)(4)(B).<sup>4</sup> This approach enables the EPA and states to work in partnership to effectively utilize resources to address pollution and assist in the state's adoption of new and revised criteria.<sup>5</sup>

For the above reasons, and after careful consideration of the issues you raised and actions you requested, the EPA is hereby denying the Petition. The EPA concludes that the use of federal rulemaking authority is not the most effective or practical means of addressing your concerns at

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<sup>2</sup> The ADEM Director Lance R. LeFleur's memorandum to the Alabama Environmental Management Commission (November 30, 2016).

<sup>3</sup> The EPA's triennial review letter to the ADEM (November 1, 2017).

<sup>4</sup> "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b).

<sup>5</sup> A United States District Court in the Fifth Circuit recently affirmed the EPA's denial of a rulemaking petition under similar circumstances in *Gulf Restoration Network v. Jackson*, 224 F. Supp. 3d 470 (E.D. La. 2016). In that case, the Fifth Circuit Court of Appeals had instructed the District Court to determine whether the EPA's denial was for reasons adequately "grounded in the statute." *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 244 (5<sup>th</sup> Cir. 2015). The District Court concluded that "the CWA is by design a states-in-the-first-instance regulatory scheme" and that "the federal role is properly characterized as a secondary or backstop role." 224 F. Supp. 3d at 476. In that context, the Court upheld the EPA's decision to not invoke federal rulemaking authority under CWA section 303(c)(4)(B) where the EPA had a reasonable explanation for preferring a state-led approach for developing water quality standards. *Id.* at 477.

this time. Accordingly, the EPA is exercising its discretion to allocate its resources in a manner that supports state activities to accomplish our mutual goals of protecting human health and aquatic life. The EPA intends to assess the progress made by the ADEM and is not foreclosing the possibility that there may be circumstances where, despite the best efforts of all, Agency action may be appropriate. In the future, if that is determined to be the case, the EPA could exercise its CWA section 303(c)(4)(B) authority.

Sincerely,

A handwritten signature in dark ink, appearing to read "D. Ross". The signature is written in a cursive, somewhat stylized font.

David P. Ross  
Assistant Administrator

